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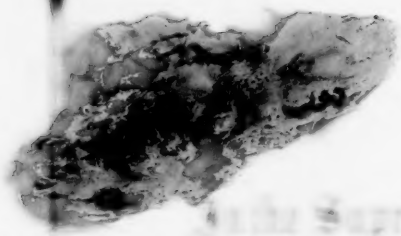

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 531

F. EUGENE NORTZ

v.

UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Court of Claims has rendered no opinion.

JURISDICTION

The certificate of the Court of Claims was filed November 16, 1934. The jurisdiction of this Court rests upon Section 3 (a) of the Act of February 13, 1925, chapter 229, 43 Stat. 936, 939.

QUESTIONS PRESENTED

The questions certified by the lower court are as follows:

> 1. Is an owner of gold certificates of the United States, Series of 1928, not holding a Federal license to acquire or hold gold coins

or gold certificates, who, on January 17, 1934, had surrendered his certificates to the Secretary of the Treasury of the United States under protest and had received therefor legal tender currency of equivalent face amount, entitled to receive from the United States a further sum inasmuch as the weight of a gold dollar was 25.8 grains, nine-tenths fine, and the market price thereof[1] on January 17, 1934, was in excess of the currency so received?

2. Is a gold certificate, Series of 1928, under the facts stated in question 1 an express contract of the United States in its corporate or proprietary capacity which will enable its owner and holder to bring suit thereon in the Court of Claims?

3. Do the provisions of the Emergency Banking Act of March 9, 1933, and the Order of the Secretary of the Treasury dated December 28, 1933, requiring the plaintiff as owner of gold certificates as stated in question 1 to deliver the same to the Treasury of the United States in exchange for currency of an equivalent amount, not redeemable in gold, amount to a taking of property within the meaning of the Fifth Amendment to the Constitution of the United States?

[1] The phrase "market price thereof" must be construed as meaning "market price of newly mined gold and of gold held for commodity purposes under a license issued by the Secretary of the Treasury," as there was no market for any other gold. (See pp. 8, 24–25, *infra*). The Court will take judicial notice of these facts.

STATUTES, ORDERS, AND REGULATIONS INVOLVED

The Emergency Banking Act of March 9, 1933, Title III of the Act of May 12, 1933, the Gold Reserve Act of 1934, the Presidential Proclamations, Executive Orders, and Orders and Regulations of the Secretary of the Treasury issued thereunder, are set forth in the Appendix to this brief filed under separate cover.

The provisions of the statutes other than the recent monetary legislation just referred to are set forth in the Appendix hereto.

STATEMENT

The plaintiff filed this action under Section 145 of the Judicial Code. It is brought on gold certificates of the United States for the recovery of the difference between the alleged market value of the amount of *gold* said to be represented by the certificates and the nominal or face value of the certificates. The petition alleges the following as facts:

For a long time prior to January 17, 1934, the plaintiff was the owner and holder of gold certificates, Series of 1928, of the United States of the face amount of $106,300 (Ctf. 1). During that entire period the weight of a gold dollar was 25.8 grains of gold, .9 fine (Ctf. 2). On January 17, 1934, the plaintiff presented such gold certificates and demanded that they be redeemed in gold coin

(Ctf. 2). At that time the value of an ounce of gold was $33.43 (Ctf. 2). The defendant refused to comply with the demand (Ctf. 2) but paid to the plaintiff in exchange for the gold certificates the sum of $106,300 in currency of the United States, which the plaintiff accepted under protest (Ctf. 3).

The plaintiff claims damages in the amount of $64,334.07, which is the difference between the alleged market value of the amount of gold asserted to be represented by the certificates at the time of their surrender on January 17, 1934, and their face amount (Ctf. 3).

The defendant demurred to the petition on the ground that it does not state a cause of action against the United States.

In addition to the foregoing alleged facts, the petition likewise contains certain conclusions of law, which, of course, are not admitted by the demurrer. Thus, the plaintiff places his own interpretation on the tenor of gold certificates (Ctf. 1). He alleges that by virtue of the agreement represented by the gold certificates he was entitled to receive one ounce of gold for each $20.67 of gold certificates. He alleges that the orders of the Secretary of the Treasury requiring the surrender of gold coin and gold certificates are invalid, and that the laws under which such orders were issued are unconstitutional (Ctf. 2).

Without passing upon the defendant's demurrer, the Court of Claims certified to this Court the questions stated above.

The record does not disclose the date upon which the plaintiff acquired his gold certificates, the petition averring merely that "for a long time prior to January 17, 1934, the plaintiff was the owner and holder" of the gold certificates upon which the suit is brought.

The Government's brief in *United States* v. *Bankers Trust Company,* Nos. 471 and 472, contains much discussion applicable to the issues in this case and it is hereby incorporated in this brief.

RECENT MONETARY LEGISLATION AND EXECUTIVE ACTION

The abandonment of the gold standard by foreign countries, the disastrous economic condition that confronted this country and the rest of the world in the Spring of 1933, the chaotic banking situation resulting in heavy runs on banks throughout the United States in February, 1933, and their consequent closing, have been reviewed in the brief in Nos. 471 and 472. (See pages 28–44.) Swift and energetic measures were essential in order to save the country from a financial panic and an economic collapse.

The steps that were taken by the Congress and the Executive are also summarized in the companion brief (pp. 101–114).

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In that brief there is also reviewed the development of our monetary system, particularly with reference to the events of recent years. The discussion (pages 19–67) bears upon the problem of the gold certificate quite as much as upon the problem of the gold clause in private obligations. It is there demonstrated that in March, 1933, it was essential for the United States to check the withdrawals of gold because of the drain that was being exerted upon the monetary stocks, and also to combat the deflationary effect which resulted from the fact that the United States alone among the important commercial powers of the world was still endeavoring to maintain the prewar gold parity of its monetary unit.

The brief does not question the authority of the United States under the circumstances existing in 1933 and the early part of 1934 to require the delivery to the United States of gold coin, gold bullion, and gold certificates. (See pages 10 and 15.)

The constitutionality of the Emergency Banking Act of March 9, 1933, was upheld in *Campbell* v. *Chase National Bank,* 5 F. Supp. 156. (S. D. N. Y.)

After April 5, 1933, gold coin, gold bullion, and gold certificates in amounts exceeding $100 in the aggregate belonging to any one person, were required to be delivered to the Federal Reserve banks.[2] After August 28, 1933, gold coin and gold

[2] The claimant asks why gold certificates were required to be delivered to the Federal Reserve banks when other

certificates in any amount, however small, could be acquired only under license issued by the Secretary of the Treasury, while the order of the Secretary of the Treasury of December 28, 1933, required the delivery to the Treasurer of the United States of all gold coin and of all gold certificates not held under license or by the Federal Reserve banks.[3]

The Executive order of April 20 and later the Executive order of August 28, 1933, prohibited the export of gold coin, gold bullion, and gold certificates except under license for purposes not relevant to the present case. Gold newly mined in the

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forms of currency were not. Finding no reason, he concludes that gold certificates are superior to other forms of currency and that as a holder of gold certificates he is entitled to greater consideration than the holders of other money of the United States. In view of the fact that the Federal Reserve Act required Federal Reserve banks to maintain, as against Federal reserve notes, a 40% reserve consisting of gold or *gold certificates*, simultaneous withdrawals of gold, gold certificates, and other currency on a large scale tended to deplete the reserves at the very time when they were most needed to serve as a base for the additional currency. The necessity for the surrender of gold certificates, therefore, arose from the need to restore the reserves rather than from any notion that there was any inherent difference between gold certificates and other types of paper currency (see brief in cases Nos. 471 and 472, pp. 39–41, and p. 54 footnote).

[3] There are numerous minor exceptions, especially relating to gold intended for industrial uses, which need not be discussed. They are referred to in the brief in Nos. 471 and 472, pp. 41–44, 101–114, and are set out in the separate appendix.

United States was permitted to be sold at prices corresponding to the price of gold in the free gold markets of the world outside of the United States.

The purpose and effect of the various orders above mentioned was to maintain the parity of all forms of currency and coin of the United States (see brief in Nos. 471 and 472, pages 24 to 28).

In the first question certified by the Court of Claims, reference is made to the market value of gold as being in excess of the statutory value of $20.67 an ounce. The Court of Claims presumably referred to the fact that newly mined gold and gold held under license for industrial uses might under certain circumstances be disposed of at a price in excess of $20.67 an ounce. The allegation in plaintiff's petition as to the "market value" of gold, if understood as referring to the value of gold in plaintiff's hands, is a conclusion of law—not of fact. As shown in the brief in Nos. 471 and 472 (pp. 131–4), there was no free market for gold, but only a limited market for newly mined gold and gold held under license for industrial use. The question must be interpreted as referring to this limited market. The plaintiff, however, had no license either to hold or to acquire gold. Had the plaintiff held any gold or gold coin, he would have been obliged to exchange it, just as he was obliged to exchange his gold certificates. In the hands of persons like the plaintiff, who did not possess a

license to acquire, to hold, or to export gold, gold coin was worth its face amount and gold bullion $20.67 an ounce.

CURRENCY OF THE UNITED STATES

It may be helpful to give a brief summary of the various types of currency circulating in the United States prior to January 17, 1934.

The money of account of the United States is expressed in dollars and decimal parts thereof.[4] The standard unit of value, with reference to which all forms of coin or currency have been maintained at a parity, is a dollar consisting of a specified weight of gold. For many years prior to January 31, 1934, this standard unit consisted of 25.8 grains of gold, nine-tenths fine.[5]

(*a*) UNITED STATES NOTES AND TREASURY NOTES OF 1890

The oldest type of currency now in circulation is that known as United States notes. They were first issued during the Civil War.[6] Under the colloquial name of "greenbacks" or "legal tenders", they made an important impression on financial

[4] Act of April 2, 1792, c. 16, Sec. 20, 1 Stat. 250; R. S. Sec. 3563.

[5] March 14, 1900, c. 41, Sec. 1, 31 Stat. 45; R. S. Sec. 3511.

[6] Feb. 25, 1862, c. 33, Sec. 1, 12 Stat. 345; July 11, 1862, c. 142, Sec. 1, 12 Stat. 532; Res. Jan. 17, 1863, No. 9, 12 Stat. 822–823; March 3, 1863, c. 73, Sec. 3, 12 Stat. 710; June 20, 1874, c. 343, Sec. 6, 18 Stat. 124; May 31, 1878, c. 146, 20 Stat. 87; Act March 4, 1907, c. 2913, Sec. 2, 34 Stat. 1289; R. S. Secs. 3571, 3583.

history. They assisted in financing the operations of the Civil War and supplied a much-needed medium of exchange, and subsequently they were for a considerable period the center of controversy until they became redeemable in specie. From the first, they were legal tender for payment of all debts, public and private, except duties on imports and interest on the public debt.[7]

Another series of notes is that known as "Treasury Notes of 1890" originally issued in payment for silver bullion purchased under the Act of July 14, 1890. They have been in process of retirement for many years and only a few remain outstanding. They have been legal tender for all debts, public and private, except where otherwise expressly stipulated in the contract.[8]

The Secretary of the Treasury is required to maintain a reserve in gold of $150,000,000 against outstanding United States notes and Treasury notes of 1890.[9]

(*b*) GOLD CERTIFICATES

Since the Civil War, the Secretary of the Treasury has received authorization to accept deposits of gold coin and gold bullion and to issue gold certifi-

[7] Until recently, most five-dollar bills in circulation were "United States notes."

[8] July 14, 1890, c. 708, Sec. 2, 26 Stat. 289; R. S. Sec. 3589.

[9] March 14, 1900, c. 41, Sec. 2, 31 Stat. 45; Dec. 23, 1913, c. 6, Sec. 7, 38 Stat. 258; Mar. 4, 1923, c. 252, Title I, Sec. 2, 42 Stat. 1457.

cates in exchange therefor.[10] Such certificates were also authorized to be issued against gold coin held in the Treasury. The first authorization provided that they may not "exceed twenty per centum beyond the amount of coin and bullion in the Treasury." In other words, for every one hundred dollars of gold coin or gold bullion held in the Treasury, there could have been issued one hundred and twenty dollars in gold certificates. Subsequent legislation dealing with gold certificates is discussed at page 21, *infra*, and is set forth in the Appendix, *infra*.

Gold certificates were formerly known as "yellowbacks", because of their color. They have been withdrawn from circulation since April 5, 1933, although the Federal Reserve banks may and do continue to hold them as reserves for Federal Reserve notes and deposits.

Gold certificates have been legal tender in payment of all debts since 1919,[11] and are the type of currency involved in the case at bar.

(*c*) SILVER CERTIFICATES

Silver certificates are a form of paper currency formerly issued only against silver dollars, now

[10] March 3, 1863, c. 73, Sec. 5, 12 Stat. 711; July 12, 1882, c. 290, Sec. 12, 22 Stat. 165; Mar. 14, 1900, c. 41, Sec. 6, 31 Stat. 47; May 26, 1906, c. 2558, 34 Stat. 202; Mar. 4, 1907, c. 2913, Sec. 1, 34 Stat. 1289; Mar. 2, 1911, c. 190, 36 Stat. 964; June 12, 1916, c. 142, 39 Stat. 225; May 29, 1920, c. 214, Sec. 1, 41 Stat. 654; R. S. Sec. 254.

[11] Dec. 24, 1919, c. 15, Sec. 1, 41 Stat. 370.

issued against silver dollars or bullion.[12] They have been in circulation since 1878. Most of the one-dollar bills in circulation are silver certificates.

(*d*) FEDERAL RESERVE NOTES

Federal reserve notes, authorized by the Federal Reserve Act as amended, are issued to Federal Reserve banks, through the Federal Reserve agents. They are covered by collateral as provided in the Federal Reserve Act and each bank was required to maintain a reserve in gold or gold certificates of not less than 40 percent of the amount of its notes in actual circulation. Federal Reserve notes are obligations of the United States.[13]

(*e*) NATIONAL BANK NOTES AND FEDERAL RESERVE BANK NOTES

National banks, ever since their first establishment during the Civil War, have been permitted to issue circulating notes secured by a like amount of bonds of the United States, the amount issuable by any bank being limited to the amount of paid-in capital of the bank.[14] Federal Reserve banks are authorized to issue Federal Reserve bank notes on the same basis,[15] except that their amount is

[12] Feb. 28, 1878, c. 20, Sec. 3, 20 Stat. 26; March 3, 1887, c. 362, 24 Stat. 509, 515.

[13] Dec. 23, 1913, c. 6, Sec. 16, 38 Stat. 265, 266; Sept. 7, 1916, c. 461, 39 Stat. 752, 754; June 21, 1917, c. 32, Sec. 7, 40 Stat. 236.

[14] Mar. 14, 1900, c. 41, Sec. 12, 31 Stat. 49; Oct. 5, 1917, c. 74, Sec. 2, 40 Stat. 342.

[15] Dec. 23, 1913, c. 6, Sec. 18, 38 Stat. 268.

not limited by the amount of paid-in capital of the bank as in the case of national bank notes. In order to provide an emergency currency the basis of issue for Federal Reserve bank notes was considerably enlarged by the Emergency Banking Act of March 9, 1933. National bank notes and Federal Reserve bank notes are obligations of the issuing bank and are redeemable at the United States Treasury.

All types of paper currency were made legal tender for all debts, public and private, including gold-clause obligations, by the Act of May 12, 1933, as amended and supplemented by Public Resolution No. 10, of June 5, 1933.

The redemption features, as they existed prior to the passage of the Emergency Banking Act of March 9, 1933, of the various types of currency above described appear in the following quotation from an official circular of the Treasury Department, dated January 26, 1927 (Sec IV, 7, 8, 9):

> 7. United States notes [16] and gold certificates [17] are redeemable in gold coin; Treas-

[16] Mar. 14, 1900, c. 41, Sec. 2, 31 Stat. 45; Dec. 23, 1913, c. 6, Sec. 7, 38 Stat. 258; Mar. 4, 1923, c. 252, Title I, Sec. 2, 42 Stat. 1457; 31 U. S. C. 408.

[17] Mar. 3, 1863, c. 73, Sec. 5, 12 Stat. 711, 31 U. S. C. 428; July 12, 1882, c. 290, Sec. 12, 22 Stat. 165; Mar. 14, 1900, c. 41, Sec. 6, 31 Stat. 47; May 26, 1906, c. 2558, 34 Stat. 202; Mar. 4, 1907, c. 2913, Sec. 1, 34 Stat. 1298; Mar. 2, 1911, c. 190, 36 Stat. 964; June 12, 1916, c. 142, 39 Stat. 225; May 29, 1920, c. 214, Sec. 1, 41 Stat. 654; 31 U. S. C. 429.

ury notes of 1890 in gold coin [18] or standard silver dollars; [19] and silver certificates [20] in standard silver dollars.

8. National-bank notes [21] and Federal reserve bank notes [22] are redeemable in lawful money of the United States by the Treasurer of the United States, but payments therefor in lawful money may be effected through the Federal reserve banks and branches. Federal reserve banks and branches will also receive national-bank notes and Federal reserve bank notes unfit for further circulation, and will make payment therefor in other forms of money, or by credit.

9. Federal reserve notes [23] are redeemable in gold by the Treasurer of the United States, and in gold or lawful money at any Federal reserve bank.

The Gold Reserve Act approved January 30, 1934, amended the Federal Reserve Act so as to provide that Federal Reserve notes "shall be re-

[18] See footnote 16.

[19] July 14, 1890, c. 708, Sec. 2, 26 Stat. 289; Mar. 14, 1900, c. 41, Sec. 2, 31 Stat. 45; Dec. 23, 1913, c. 6, Sec. 7, 38 Stat. 258; Mar. 4, 1923, c. 252, Title I, Sec. 2, 42 Stat. 1457; 31 U. S. C. 408.

[20] Feb. 28, 1878, c. 20, Sec. 3, 20 Stat. 26; Mar. 3, 1887, c. 362, 24 Stat. 515; 31 U. S. C. 405.

[21] June 20, 1874, c. 343, Sec. 3, 18 Stat. 123; Dec. 23, 1913, c. 6, Sec. 20, 38 Stat. 271; 12 U. S. C. 121; July 14, 1890, c. 708, Sec. 6, 26 Stat. 289; 12 U. S. C. 122; June 20, 1874, c. 343, Sec. 3, 18 Stat. 123; 12 U. S. C. 123.

[22] Dec. 23, 1913, c. 6, Sec. 18, 38 Stat. 268; 12 U. S. C. 445.

[23] Dec. 23, 1913, c. 6, Sec. 16, 38 Stat. 265; 12 U. S. C. 411.

deemed in lawful money on demand at the Treasury Department of the United States, in the city of Washington, District of Columbia, or at any Federal Reserve bank." The Gold Reserve Act further provides: "Except to to the extent permitted in regulations which may be issued hereunder by the Secretary of the Treasury, with the approval of the President, no currency of the United States shall be redeemed in gold." * * *

SUMMARY OF ARGUMENT

I.

Even if the Court of Claims has jurisdiction of this suit, the plaintiff is not entitled to recover. Gold certificates, if they may be regarded as contracts, which we deny, are not warehouse receipts for a specified quantity of gold but are monetary obligations. On January 17, 1934, contractual obligations could be liquidated by the payment of any legal-tender currency, and hence the defendant's obligation to the plaintiff, if contractual, was fully satisfied when he received legal-tender currency in exchange for his gold certificates. Title III of the Act of May 12, 1933, and the Joint Resolution of June 5, 1933, made all forms of currency legal tender for the payment of all debts.

The plaintiff has sustained no damage, since if he had received gold coin on January 17, 1934, he would have been obligated forthwith to surrender it to the Secretary of the Treasury and receive